PREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. [redacted] 157

UNITED STATES OF AMERICA,
Respondent,

v.

DOUGLAS HOUSTON and JOHN LEWIS SIMPSON,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case May 7, 1968.

OPINIONS BELOW

Neither the opinion of the District Court for the Eastern District of Tennessee, Northeastern Division, nor of

the Court of Appeals for the Sixth Circuit is reported. The Court of Appeals for the Sixth Circuit did not write an opinion. The Trial Court's opinions are in the appendix at pages 17 and 67.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

QUESTION I

Did the Court err in holding, after ruling

A. The search warrant invalid

B. That the search and seizure resulted from the execution of that warrant

that the search was made on probable cause, and as incidental to a lawful arrest overruling defendants' motion to suppress?

QUESTION II

Did the Court err in disallowing the defendants' position that the government was estopped from seeking to rely on "probable cause" when the government's own chief witness who was in charge of the arresting party testified that he acted in both the arrest and the search relying on the search warrant and the warrant alone—a warrant which the Trial Court has ruled invalid?

QUESTION III

Did the Court err in denying defendants' motion to require the government to reveal the identify of the government's paid informer?

STATUTES, FEDERAL RULES AND REGULATIONS INVOKED

The pertinent portions of Title 26, Section 5202(a)(2) and 5604(a)(1), U.S.C. 4(a), are set forth in the appendix hereof at page 76.

STATEMENT

The petitioners were arrested on March 11th, 1967 by the United States officers acting under the apparent authority of a search warrant dated March 11, 1967 (APP. pp. 22-23, 38, 45-46). On March 30th, 1967, an indictment was filed charging petitioners with violations of the statutes cited above.

Federal agents received information prior to March 6, 1967 from a paid government informer, a known bootlegger and competitor of the petitioners, that petitioners were in the business of selling tax unpaid whiskey (APP. pp. 27-37, 44-45).

As a result of the information from the informer, the agents conducted a surveillance of the defendants, and during several days of watching the defendants from the building near where the defendants were arrested, the agents saw nothing more than petitioners handling boxes with "Ball Mason Jars" printed on the boxes (APP. pp. 34, 39, 40).

On March 6, agents stopped a vehicle occupied by the petitioners on private property adjacent to the dwelling house occupied by petitioner Douglas Houston and served the search warrant, found whiskey and arrested the petitioners (APP. pp. 25-26, 45-46).

The petitioners pled not guilty on arraignment, and filed a motion to suppress evidence on the ground that the search warrant was invalid (APP. p. 14) and accordingly the search and seizure were ruled invalid.

The Court ruled the search warrant invalid, but overruled the petitioners' motion to suppress on the ground that the arrest was made on probable cause and that the search was made incidental to a lawful arrest (APP. pp. 20, 71).

The Court overruled petitioners' motion to require the government to reveal the identity of the informer (APP. pp. 63-66).

On the hearing the jury found the defendants guilty and a Judgment was entered September 21, 1967, an appeal was perfected in the United States Court of Appeals for the Sixth Circuit, and on the 7th day of May, 1968, the Court of Appeals for the Sixth Circuit affirmed the Judgment of the lower Court (APP. p. 75).

REASONS FOR GRANTING THE WRIT

The decision below should be reversed because it is contrary to the decisions of this Honorable Court on the issues involved. The Court in holding that the arrest was valid relied on the cases which hold that arrest made on "probable cause" without a warrant, is legal where the search is made incidentally to the lawful arrest. There can be no argument that this is the rule that has been followed by this Court in the past and petitioners do not argue with the rule, but seriously contend that there is no probable cause and that the government is estopped by reason of the fact that they made the search relying on the government's agents admission that the arrest was made pursuant to the warrant rather than to any lawful arrest.

If the arrests were not legal, the officers had no right to conduct a search, because it is well settled that to justify a search as incidental to a lawful arrest the arrest must in fact be a lawful one. *Carroll v. United States*, 276 U.S. 132, 45 S.Ct. 280; *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341.

Whether or not the arrest is lawful, when there is no arrest warrant or search warrant, and when no crime is committed in the presence of the officers, seems to turn on whether the primary intent was to search or whether the intent was to make an arrest.

It is well recognized that the intent of the arresting or searching officer is of paramount importance in determining the issue. If the intent is to make the arrest and then conduct the search, petitioners submit that there is no basis for the government to make a convincing argument that the officers would have made an arrest in this case had there been no search. It is obvious from all facts in the record that there would have been no arrest had the search not been fruitful.

It is clear from the reasoning in *Jones v. United States*, 357 U.S. 493, 2 L. Ed. 2d 1514, 78 S.Ct. 1253, that the primary determining factor is the intention of the officers. If the intention were to search for the evidence seized rather than to arrest the defendant, the ensuing search is invalid. In *Jones* the Court relied on the testimony given by the officers of the searching party in determining the intent. The Court in summing up the government's contention stated:

> "The Government, however, for the first time now maintains the search and seizure were justifiable as is: The federal agents involved in this search had authority under federal law to arrest without a war-

rant upon probable cause to believe that a person had committed a felony. From the record it is 'rational' to infer that the federal agents with the purpose of arresting him upon probable cause to believe that he was guilty of a felony and that he was then in the house. Consequently, the agents' entry was justified and, once in the house, while searching for petitioner, they could seize all contraband material in plain sight. The fact that the petitioner was not found does not vitiate the legality of the seizures."

The intent to search rather than to arrest is no clearer in the *Jones* case than it is in the case at hand. Of course in both cases, this is the element that causes the ensuing arrest to be invalid.

The Court does not have to attempt to infer what the intent of the officers was in the present case, because their intent is clearly stated in the testimony, the avowed purpose being to execute the search warrant and make the search called for in the warrant. Nowhere in the record is there any evidence that the search was not made relying on the warrant the officers had in their possession. Naturally the intent of executing a search warrant is to make a search and with the further provision that if the search reveals contraband arrests will be made. This, it seems, is what the Court had in mind when it said in *Jones*:

"Although it must be recognized that the basis of the two lower court decisions is not wholly free from ambiguity, a careful consideration of the record satisfied us that the search and seizure were considered to have been justified because the officers had probable cause to believe that the petitioner's house contained contraband materials which were being utilized in the commis-

sion of a crime and not because the search and seizure were incident to the petitioner's arrest. So viewed the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States and with the past decision of this Court."

The District Attorney's office, after the Court ruled the warrant invalid, as an afterthought and an after the fact procedure raised the question of probable cause. The petitioners do not argue that legal arrest cannot be made on "probable cause" but do argue seriously that the concept of "probable cause" does not supply the necessary intent or correct the illegal intent in the minds of the arresting and searching officers at the time of the arrest.

There is another good reason why the decision below should be reversed. The informer, whose information started the investigation in the present case and the information which he gave to the officers were both unreliable if not in fact fraudulent. The government's case is based on the search made on "probable cause" as incident to a lawful arrest. The motives, background, reputation and all aspects of the informer's existence, under these circumstances, become critically important.

The whiskey was not found where the informant advised officers it would be (APP. pp. 32-33). The informer was paid (APP. p. 45) and had himself been in the illegal whiskey business (APP. p. 47).

The petitioners' moved that the government be required to reveal the identity of the informer (APP. pp. 54, 55, 63-65) and the Court overruled the motion (APP. pp. 65-66).

In *Aguilar v. Texas*, 378 U.S. 108, this Court held that before a search warrant could properly issue upon infor-

mation supplied by an informant, the Magistrate being asked to issue the warrant must be informed, not only (1) of some of the underlying circumstances from which the police concluded that the informer was credible, but (2) of some of the underlying circumstances from which the informer concluded that the evidence to be seized was where he claimed it was.

It is obvious that the facts of the instant case do not meet the *Aguilar* test. Nowhere in the record does it appear where the agents were aware of the circumstances from which the anonymous informant concluded that the narcotics were at the location he told them. Not only is this fact true, but additionally the officers did not at any time see any contraband at or near the location described by the informant and when they searched these locations did not find any contraband. Therefore, obviously the informant was completely in error at all times in the information that he gave the officers concerning the location of the contraband. Certainly, under no circumstances, where the informant does not have any reliable or accurate information regarding the location of the contraband could a search warrant have issued legally. And as set forth in *Aguilar* the agents would also have been unable to obtain a valid arrest warrant, the standards being the same. Accordinly, they could not have made a legal arrest without a warrant. This doctrine was recently upheld in the United States Court of Appeals for the Second Circuit in United States v. Soyaka, ... F. 2d ..., January 18, 1968. In that case, the Court reversed the conviction of the appellant for the reason that the record did not disclose or in any way establish the basis for the informant's conclusion that the appellant had narcotics in his apartment. The Court rejected the government's position that *Aguilar* did not apply because

the informant gave a "wealth of detail" which made it clear that he knew the location of the contraband by personal observation. The instant case clearly falls within the purview of the *Aguilar* and *Soyaka* cases and accordingly should be dismissed.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this cause should be reversed and the charges against them dismissed.

Respectfully submitted,

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May 31, 1968.